85-708

No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ALL SOULS EPISCOPAL CHURCH,
Petitioner,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION and DEPOSIT INSURANCE NATIONAL BANK OF OKLAHOMA CITY, OKLAHOMA,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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October, 1985

QUESTIONS PRESENTED

Whether federal law providing for the liquidation of national banking associations ipso facto takes precedence over state substantive law governing commercial paper, bank deposits and collection.

Whether, in a commercial context and in the absence of federal statute, respondents' restitutionary rights are governed by the substantive law of the state in which the disputed legal relationship arose.

PARTIES INVOLVED

The petitioner herein, the defendant-appellee below, is All Souls Episcopal Church, a non-profit, charitable corporation organized and existing under the laws of the State of Oklahoma.[1]

The respondents herein, the plaintiffs-appellants below, are Federal Deposit Insurance Corporation, a corporation created under the laws of the United States and Deposit Insurance National Bank of Oklahoma City, a national banking association.

[1] All Souls does not have a parent company, subsidiary or affiliate.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. ——

ALL SOULS EPISCOPAL CHURCH,
Petitioner,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION and DEPOSIT INSURANCE NATIONAL BANK OF OKLAHOMA CITY, OKLAHOMA,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in these proceedings on August 2, 1985, (petition for rehearing denied September 17, 1985) reversing the judgment of the United States District Court for the Western District of Oklahoma in favor of petitioner determining substantive law applicable to the failure of Penn Square Bank, N.A., and that on hearing the judgment

of the United States Court of Appeals for the Tenth Circuit be reversed.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 769 F.2d 658 and is reproduced as Appendix "A" hereto.

The unappealed order of the United States District Court for the Western District of Oklahoma dismissing the interpleader action brought by Fidelity Bank, N.A., against petitioner and respondent, FDIC is not reported and is reproduced as Appendix "B" hereto.

The memorandum opinion and order, of the United States District Court for the Western District of Oklahoma dated, September 4, 1984, granting petitioner's motion for summary judgment and denying respondents' action for restitution of money finally paid in excess of the deposit insurance limit, is not reported and is reproduced as Appendix "C" hereto.

The judgment of the United States District Court for the Western District of Oklahoma, entered in accordance with the memorandum opinion and order, dated September 4, 1984, in favor of petitioner and against respondents is not reported and is reproduced as Appendix "D" hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on August 2, 1985. Motion for rehearing was denied on September 17, 1985. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

12 U.S.C. § 91 provides:

Transfers by bank and other acts in contemplation of insolvency.

All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void; and no attachment, injunction, or execution, shall be issued against such association or its property before final judgment in any suit, action, or proceeding, in any State, county, or municipal court.

12 U.S.C. § 194 provides:

Dividends on adjusted claims; distribution of assets.

From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved

or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held.

12 U.S.C. § 1813(1)(4) provides, in part:

Definitions.

As used in this chapter—

* * *

(1) The term "deposit" means—

* * *

(4) outstanding draft (including advice or authorization to charge bank's balance in another bank), cashier's check, money order, or other officer's check issued in the usual course of business for any purpose, including without being limited to those issued in payment for services, dividends, or purchases, and

12A O.S. (1981) § 3-418 provides:

Finality of Payment or Acceptance.

Except for recovery of bank payments as provided in the article on Bank Deposits and Collections (Article 4) and except for liability for breach of warranty on presentment under the preceding section, payment or acceptance of any instrument is final in favor of a holder in due course, or a person who has in good faith changed his position in reliance on the payment.

12A O.S. (1981) § 4-213 provides, in part:

Final Payment of Item by Payor Bank; When Provisional Debits and Credits Become Final; When Certain Credits Become Available for Withdrawal.

(1) An item is finally paid by a payor bank when the bank has done any of the following, whichever happens first:

(a) paid the item in cash; or

(b) settled for the item without reserving a right to revoke the settlement and without having such right under statute, clearing house rule or agreement; or

(c) completed the process of posting the item to the indicated account of the drawer, maker or other person to be charged therewith; or

(d) made a provisional settlement for the item and failed to revoke the settlement in the time and manner permitted by statute, clearing house rule or agreement.

Upon a final payment under subparagraphs (b), (c) or (d) the payor bank shall be accountable for the amount of the item.

12A O.S. (1981) § 4-214 provides:

Insolvency and Preference.

(1) Any item in or coming into the possession of a payor or collecting bank which suspends payment and which item is not finally paid shall be returned by the receiver, trustee or agent in charge of the closed bank to the presenting bank or the closed bank's customer.

(2) If a payor bank finally pays an item and suspends payments without making a settlement for the item with its customer or the presenting bank which settlement is or becomes final, the owner of the item has a preferred claim against the payor bank.

(3) If a payor bank gives or a collecting bank gives or receives a provisional settlement for an item and thereafter suspends payments, the suspension does not prevent or interfere with the settlement becoming final if such finality occurs automatically upon the lapse of certain time or the happening of certain events (subsection (3) of Section 4-211, subsections (1)(d), (2) and (3) of Section 4-213).

(4) If a collecting bank receives from subsequent parties settlement for an item which settlement is or becomes final and suspends payments without making a settlement for the item with its customer which is or becomes final, the owner of the item has a preferred claim against such collecting bank.

STATEMENT

Friday, July 2, 1982. Penn Square Bank, N.A., a national banking association insured by FDIC, issued three cashier's checks naming All Souls as payee. All Souls transferred the cashier's checks, by endorsement, to Fidelity Bank, N.A., in exchange for the simultaneous issuance, on Friday, by Fidelity Bank of certificates of deposit in favor of All Souls. All Souls received immediate credit for the cashier's checks transferred to Fidelity. After interpleader action was dismissed All Souls withdrew Fidelity Bank certificates of deposit with interest paid from Friday, July 2, 1982. Both Penn Square and Fidelity Bank were located in Oklahoma City, Oklahoma.

Monday, July 5, 1982. Penn Square was declared insolvent by the United States Office of the Comptroller of the Currency and FDIC was appointed its receiver. FDIC applied for and obtained a charter for the for-

mation of Deposit Insurance National Bank of Oklahoma City, Oklahoma to assume the insured deposits of Penn Square and otherwise to perform the functions of a national bank. FDIC transferred funds to DINB from its permanent insurance fund in an amount estimated to have been equal to the insured deposits of Penn Square plus the initially anticipated operating expenses, which may include expected losses of DINB, pursuant to the provisions of 12 U.S.C. §§ 1821 (a), (f) and (j).

Tuesday, July 6, 1982. Fidelity Bank's President hand carried the cashier's checks, together with other items drawn on Penn Square, to the former offices of Penn Square, being occupied by FDIC and DINB. FDIC's Chief Liquidator advised him that DINB was bound by the same laws applicable to other national banking associations operating within the State of Oklahoma. Further, that if an item drawn on Penn Square and presented to DINB was not returned in the time permitted by law, i.e., not returned within the midnight deadline as defined in the Uniform Commercial Code § 4-104(1)(h), DINB or FDIC "*bought it*"!

Thursday, July 8, 1982. The cashier's checks were finally paid in full to Fidelity Bank.

Thereafter, FDIC demanded that Fidelity Bank return the proceeds from the cashier's checks. Fidelity Bank filed an interpleader action in the United States District Court for the Western District of Oklahoma against All Souls and FDIC. The United States District Court dismissed the interpleader action because Fidelity Bank was a "holder in due course" of the cashier's checks against which the FDIC had no claim

since the cashier's checks had been finally paid. (Appendix "B" p. 7). No appeal was taken from this United States District Court decision!

July 27, 1983. FDIC and DINB sued All Souls. The action sought restitution from All Souls, alleging that the final payment of the cashier's checks made to Fidelity Bank by DINB after the closing of Penn Square, was a mistake.

September 4, 1984. The United States District Court for the Western District of Oklahoma, finding that the facts were not in dispute, granted All Souls' motion for summary judgment while denying respondents' motion for summary judgment. (Appendix "D" p. 14). Judge West held that when FDIC organized DINB ". . . they assumed a host of attendant duties. In particular, they stepped into the complex and arcane world of bank collections, for when the Bank failed, there were surely myriad items being processed." (Appendix "C" p. 13). The "final payment rule" required that DINB be accountable for the cashier's checks under 12A O.S. (1981) § 4-213(1). The action for restitution was barred by 12A O.S. (1981) § 3-418. Respondents appealed.

The principal issue on appeal was whether FDIC and DINB were barred from maintaining an action for restitution against All Souls. The Court of Appeals for the Tenth Circuit found that All Souls was in the position of a creditor of Penn Square, ". . . an insolvent national bank, and since the federal law providing for liquidation of a national bank must take precedence over the U.C.C. we reverse." 769 F.2d 658 at 660. All Souls' petition for rehearing was denied September 17, 1985.

The opinion of the United States Court of Appeals for the Tenth Circuit is in error in the following particulars:

1. *Finding that checks had been deposited for collection.* (Appendix "A" at p. 3) In fact, the cashier's checks were used to purchase certificates of deposit and Fidelity Bank became a holder in due course. (Appendix "B" at ps. 4-8).

2. *The consequence of insolvency converted the cashier's checks from negotiable instruments to deposits.* (Appendix "A" at p. 5) This statement ignores the fact that the cashier's checks had been paid by DINB.

3. *The defendants were creditors of an insolvent national bank and payment would create a preference in defendants favor over other creditors.* (Appendix "A" at ps. 5, 7) All Souls was not the creditor, Fidelity Bank was, so respondents sued the wrong party. 12 U.S.C. § 91 provides for preferences but DINB paid the cashier's checks out of FDIC permanent insurance fund proceeds not Penn Square funds so the statement as to preference is nonsense. In addition, DINB was not insolvent and paid by mistake not with intent to prefer Fidelity Bank over other Penn Square customers.

4. *The result is the harsh reality and consequence of Penn Square's insolvency.* Appendix "A" at p. 7) The decision represents the harsh reality of a Court of Appeals which misapplied the law to the facts as they relate to All Souls.

REASONS FOR GRANTING THE WRIT

The issue of applying the U.C.C. to commercial transaction involving banks insured by FDIC is mandated by FDIC's regulations, Part 330—Clarification and Definitions of Deposit Insurance Coverage Regulations § 330.1(a) provides:

> (a) General. This Part 330 provides for determination by the [Federal Deposit Insurance] Corporation of the insured depositors of an insured bank and the amount of their insured deposit accounts. The rules for determining the insurance coverage of deposit accounts maintained by depositors in the same or different rights and capacities in the same insured bank are set forth in the following provisions of this part. *Insofar as rules of local law enter into such determinatons, the law of the jurisdiction in which the insured bank's principal office is located shall govern,* except where the insured bank is an insured branch of a foreign bank, in which case the law of the jurisdiction where the insured branch is located shall govern. (emphasis added)

In the absence of a federal statute, even in cases in which FDIC is a party, federal common law applies. *D'Oench, Duhme & Co.* v. *Federal Deposit Insurance Corp.*, 315 U.S. 447, 456-459 (1941). State law is an important source of federal common law. *D'Oench, Duhme,* 315 U.S. 447 at 474; *See also Federal Deposit Insurance Corp.* v. *Bank of America National Trust & Savings Association,* 701 F.2d 831, 834, 835 (9th Cir. 1983) and *United States* v. *Kimbell Foods,* 440 U.S. 715, 726, 727, 729 (1979).

The rule codified by the sections of the U.C.C. applicable in this case, specifically § 3-418, is merely a codification of the common law as adopted by this Court

in *United States* v. *Chase National Bank,* 252 U.S. 485 (1920). *See Price* v. *Neal,* 3 Burr. 1354 (1762).

In the absence of controlling state substantive law, restitution in favor of the government has been recognized under proper circumstances. *United States* v. *Wurts,* 303 U.S. 414, 415 (1938). However, the FDIC, as an agency of the United States should be treated as any other party. *Clearfield Trust Co.* v. *United States,* 318 U.S. 363, 369 (1943). As a general rule, payment made by a bank in the usual course of business is not recoverable, even though the bank was then clearly insolvent. *Mechanics Universal Joint* v. *Culhane,* 299 U.S. 51, 56 (1936).

The clear language of 12 U.S.C. § 91 requires that certain circumstances exist before one customer of an insolvent bank has been preferred over another. This Court has addressed the plain meaning of § 91 in *Third Natl. Bank in Nashville* v. *Impac Limited, Inc.,* 432 U.S. 312 (1972). Section 91 should be reviewed because of the large number of insured bank insolvencies which have occurred and appear to continue to be occurring nationwide, in the aftermath of Penn Square, and resolved, as stated by the dissent in *Third Nat. Bank in Nashville* v. *Impac Limited, Inc.,* 432 U.S. at 331.

As a policy matter, the special statutorily authorized nationals banks such as DINB, which FDIC is permitted to create when another has failed, should be bound by the same rules of law as any other national bank doing business in the same state. The Court of Appeals decision ignores the U.C.C. and strains to rule for the government agency and against the church. DINB took advantage of the U.C.C. in clearing and processing bank items for collection. Not only is the

Court of Appeals decision bad policy, it is unfair. Without this Court's guiding light, that unfairness is likely to be repeated in other cases.

If the U.C.C. is determined to be "surrogate federal law" as that term is used in *Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U.S. 473, 480 (1981), it should be applied with the same dignity as The National Bank Act.

CONCLUSION

The issues brought before this Court are of concern to each FDIC insured bank and every holder in due course of a cashier's check in the United States. The decision reached by the Tenth Circuit Court of Appeals in the instant case renders the Uniform Commercial Code which has been adopted by virtually every state, a nullity. One purpose of the U.C.C. is to make commercial paper, bank deposits and collection transactions reliable by ending them when an instrument has been paid. How long after a cashier's check, which has been drawn and accepted by the issuing bank and negotiated to a holder in due course before the issuing bank fails, and thereafter paid by FDIC or DINB, its statutory agent, can the original transaction be reopened and the entire series of commercial transactions relating thereto upset? There is no conflict between The National Bank Act and the Uniform Commercial Code and to hold, without reason, that one takes precedence over the other creates chaos in the already complex world of commercial transactions. The scope and application of The National Bank Act are federal questions which should be resolved by this Court.

For all of the above reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner

October, 1985

CERTIFICATE OF SERVICE

The undersigned hereby certifies that I deposited one copy of the Petition for Writ of Certiorari in a United States post office or mailbox, with first-class postage prepaid, addressed to each of the following: Sidney G. Dunagan and Charles V. Wheeler of the firm Gables & Gotwals, 20th Floor, Fourth National Bank, Tulsa, Oklahoma 74119, the attorneys of record for Federal Deposit Insurance Corporation and Deposit Insurance National Bank of Oklahoma City, Oklahoma; the Solicitor General, Department of Justice, Washington, D.C. 20530; and Federal Deposit Insurance Corporation, 550 - 17th St., N.W., Washington, D.C. 20429, and that all parties required to be served have been served, on October 21, 1985.

MICHAEL PAUL KIRSCHNER

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 84-2350

FEDERAL DEPOSIT INSURANCE CORPORATION and
DEPOSIT INSURANCE NATIONAL BANK OF
OKLAHOMA CITY, OKLAHOMA
Plaintiffs-Appellants,

vs.

PAULINE MCKNIGHT, PAULINE OIL AND GAS COMPANY
and ROCKET OIL COMPANY,
Defendants-Appellees.

No. 84-2352

FEDERAL DEPOSIT INSURANCE CORPORATION and
DEPOSIT INSURANCE NATIONAL BANK OF
OKLAHOMA CITY, OKLAHOMA
Plaintiffs-Appellants,

vs.

ALL SOULS EPISCOPAL CHURCH,
Defendant-Appellee.

[Filed August 2, 1985. Howard K. Phillips, Clerk]

Appeal from the United States District Court
for the Western District of Oklahoma
(D.C. Nos. CIV-83-185-W, CIV-83-186-W,
CIV-83-188-W, and CIV-83-1794-W)

Charles V. Wheeler and Sidney G. Dunagan of Gable & Gotwals, Tulsa, Oklahoma, for Plaintiffs-Appellants.

B. J. Rothbaum, Jr., of Linn & Helms, Oklahoma City, Oklahoma, for Defendant-Appellee Rocket Oil Company.

Michael Paul Kirschner of Hastie and Kirschner, Oklahoma City, Oklahoma, for Defendant-Appellee All Souls Episcopal Church.

George W. Dahnke and Merrilyn L. Blackburn of Hastie and Kirschner, Oklahoma City, Oklahoma, on the brief for Defendants-Appellees Pauline McKnight and Pauline Oil and Gas Company.

Before BARRETT, MOORE and TIMBERS,* Circuit Judges

MOORE, Circuit Judge

This is an appeal from a judgment denying plaintiffs, Federal Deposit Insurance Corporation (FDIC) and Deposit Insurance National Bank of Oklahoma City (DINB), relief on their claim for restitution of money mistakenly paid on cashier's checks issued by the insolvent Penn Square Bank, N.A. (Penn Square). The district court concluded that even though the plaintiffs established a *prima facie* case for restitution, their recovery was barred by the final payment rule of the Uniform Commercial Code (U.C.C.). We conclude the trial court correctly decided the question of restitution, but in applying the U.C.C. to this case, it overlooked the consequences of Penn Square's insolvency. Since those consequences placed the defendants in the position of creditors of an insolvent national bank, and since the federal law providing for liquidation of a national bank must take precedence over the U.C.C., we reverse.

This action has its genesis in a number of separate transactions negotiated by the defendants immediately prior to the closing of Penn Square. While the district court found there was no evidence that any defendant knew of Penn Square's impending failure when these transactions oc-

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* Honorable William H. Timbers, United States Circuit Judge for the Second Circuit, sitting by designation.

curred, the proximity of the events to Penn Square's insolvency is the underlying cause of what followed. On July 1, 1982, two banking days prior to Penn Square's closing, defendant Rocket Oil Company redeemed a certificate of deposit (CD) in the face amount of $1.5 million for $1,480,273.98, taking a Penn Square cashier's check of even amount in place of cash. On the following day, defendants Pauline Oil Company and Pauline McKnight liquidated both matured and unmatured CD's and converted the proceeds to cashier's checks totaling $323,538.46. On the same day, defendant All Souls Episcopal Church redeemed two CD's and other paper and exchanged the proceeds for three cashier's checks in the aggregate of $452,527.25. All of the checks received by defendants were deposited in their own banks for collection.

At 7:00 p.m., Monday, July 5, 1982, before any of the checks were presented for payment, the Comptroller of the Currency of the United States declared Penn Square insolvent under 12 U.S.C. § 191, and appointed FDIC to act as receiver pursuant to 12 U.S.C. § 1821(c). FDIC, in turn, organized DINB as a new bank through which insured parties were to be paid. FDIC transferred to DINB funds with which to accomplish this purpose and to conduct operations.

One of the first tasks performed by FDIC employees was the programming of the bank's computer to reject any items in excess of $100,000 drawn against Penn Square accounts. This was done to avoid payment of any withdrawal in excess of the deposit insurance limits. By oversight, the program was not extended to cover cashier's checks issued by Penn Square. Before this error was discovered on July 7, all of the cashier's checks issued to defendants had been presented by the collecting bank and paid by plaintiffs. Upon discovery of these payments, this action was commenced to recover the difference between the insured amounts and the amounts actually paid.

As the facts were not in dispute, the issues were ultimately resolved on cross-motions for summary judgment. FDIC asserted that upon the date of insolvency, all outstanding and unpaid cashier's checks of Penn Square had been converted to deposits by operation of law.[1] This contention was based upon 12 U.S.C. § 1813(1)(4), which states: "The term 'deposit' means . . . [an] outstanding . . . cashier's check, . . . issued in the usual course of business *for any purpose* . . . ." (Emphasis added.) FDIC further contended that payment of any of the cashier's checks in excess of $100,000, the insured amount of any deposit, was a mistake subject to restitution.

Defendants countered with many contentions, principally that they accepted the Penn Square cashier's checks in good faith and that they were thus holders in due course. Accordingly, they argued they were entitled to application of the "final payment rule," which states that payment of any instrument is final as to a holder in due course. U.C.C. § 3-418; Okla. Stat. tit. 12A, § 3-418 (1971).

After consideration of the arguments, the trial court concluded the plaintiffs made a *prima facie* case for restitution. The court, in effect, reasoned that 12 U.S.C. § 1813 (1)(4) governed, that defendants were only entitled to payment of the insured amount, and that payment of sums of money greater than the insured amount constituted unjust enrichment. We concur with this reasoning. Yet, the court went on to conclude that since plaintiffs' claims to restitution were based on negotiable instruments, "special rules" in defense were applicable. The court then proceeded to apply the final payment rule. Holding payment of the cashier's checks constituted final payment, the court barred recovery of restitution. We disagree.

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[1] Some defendants contend this issue is raised for the first time on appeal. Clearly, that is not the case.

Application of the final payment rule was erroneous for a number of reasons. First, as the trial court recognized in concluding plaintiffs had made a *prima facie* case, the consequence of insolvency and the resultant application of the apposite portion of the Federal Deposit Insurance Act [12 U.S.C. § 1813(1)(4)] converted the cashier's checks from negotiable instruments to deposits by operation of law. Thus, the "special rules" applicable to negotiable instruments are irrelevant.

Second, and of greater importance, when the uncollected cashier's checks were finally presented, the defendants were creditors of an insolvent national bank. As such, their rights and liabilities became fixed by the National Bank Act. When that act provides a remedy, it takes precedence over state law. *Cf. Harmsen* v. *Smith*, 693 F.2d 932 (9th Cir. 1982), *cert. denied*, 104 S. Ct. 89 (1983). Here, the National Bank Act provides for the liquidation of the debts of an insolvent national bank. Accordingly, payment of the debts of Penn Square following insolvency had to have been made in compliance with the National Bank Act, not the Uniform Commercial Code.

Finally, neither the good faith of the defendants nor the source of the funds used to acquire the cashier's checks is of consequence. Despite their good faith and the origin of the funds,[2] the defendants have been cast by law into the role of creditors,[3] and, as such, they must be treated in a circumscribed fashion.

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[2] Some defendants have argued because the money used to acquire the cashier's checks came from their deposits, the cashier's represented "their" money.

[3] Despite the effort made by some defendants to otherwise cast their role, this conclusion is inescapable. Even had insolvency not occurred, as holders of unpaid cashier's checks drawn on Penn Square, defendants were still creditors. We have previously made plain a cashier's check is nothing more than a debt of the bank

The seminal point is the closing of Penn Square. That event not only triggered the liquidation process, but it also cast in stone the relationship of defendants to the bank. "It is well settled that the rights and liabilities of a bank and the bank's debtors and creditors are fixed at the declaration of the bank's insolvency." *American National Bank v. FDIC*, 710 F.2d 1528, 1540 (11th Cir. 1983). *See also* 7 Michie on Banks and Banking, Ch. 15, §§ 236, 247 (perm. ed. 1980 and supp. 1985). It is of equal certainty that the holder of a cashier's check is not entitled to preference over general creditors when the issuing bank fails before payment of the check. 10 Am. Jur. 2d *Banks* § 799 (Supp. 1983). Hence, when the cashier's checks were presented by the collecting bank, they represented an indebtedness subject to ratable dividends to be paid by the FDIC from the remaining Penn Square assets. 12 U.S.C. § 194.

Notwithstanding, it must also be kept in mind that the FDIC functioned as both receiver and insurer in this liquidating process. For this reason, the provisions of the Federal Deposit Insurance Act and the National Bank Act work, and must be read, conjunctively. Therefore, in its capacity as insurer, FDIC was required to pay each of the debts represented by the cashier's checks as insured deposits in accordance with § 1813(1)(4) and 12 C.F.R. § 330.11. Payment of any sums in excess of the insured amounts, however, would be contrary to the statutory provisions for liquidation and would create a preference of the defendants over the other creditors of Penn Square.

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accepted by it upon issuance. *Anderson, Clayton & Co.* v. *Farmers National Bank of Cordell*, 624 F.2d 105 (10th Cir. 1980). Moreover, even though defendants' banks had "paid" the checks, payment did not come from the issuing bank, Penn Square. Hence, the "payment" received by defendants was not final, and the checks were simply in the process of collection when the Penn Square insolvency occurred. *Cf.* U.C.C. § 3-501.

Although defendants have argued that this is an inequitable result, it is nonetheless the harsh reality and consequence of Penn Square's insolvency.

The judgment of the trial court is reversed and the case remanded for entry of judgments in favor of plaintiffs for the difference between the amounts mistakenly paid and the insured amount to which each defendant is entitled.

JULY TERM — September 17, 1985

Before Honorable James E. Barrett, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable John P. Moore, and Honorable William H. Timbers*, Circuit Judges

No. 84-2352

FEDERAL DEPOSIT INSURANCE COMPANY, etc., et al,
Plaintiffs-Appellants,

vs.

ALL SOULS EPISCOPAL CHURCH,
Defendant-Appellee.

This matter comes on for consideration of appellee's petition for rehearing and suggestion for rehearing en banc filed in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision sought to be reheard.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Chief Judge William J. Holloway, Jr., and Judge Stephanie K. Seymour, did not participate.

/s/ HOWARD K. PHILLIPS
Howard K. Phillips, Clerk

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* Of the United States Court of Appeals, Second Circuit, sitting by designation.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

CIV 82-1042-R

FIDELITY BANK, N.A., *Plaintiff*,

-vs-

THE FEDERAL DEPOSIT INSURANCE CORPORATION, in its capacity as Receiver for Penn Square Bank, N.A. and ALL SOULS EPISCOPAL CHURCH, *Defendants*.

[Filed October 22, 1982. Herbert Hope, Clerk, U.S. District Court]

ORDER

This action in interpleader was commenced by Plaintiff, Fidelity Bank, N.A. against the Federal Deposit Insurance Corporation, in its capacity as Receiver for Penn Square Bank, N. A. ("F.D.I.C.") and against All Souls Episcopal Church ("All Souls"). Jurisdiction was alleged to be proper under the provisions of 12 U.S.C. § 1819 (Fourth) and 28 U.S.C. § 1331(a). The Plaintiff filed a Motion for Leave to Deposit Money with the Court which was set for hearing on July 20, 1982. Plaintiff claimed to be a mere stakeholder of the $452,527.25 fund and stated that it claimed no interest in the disputed fund and therefore requested that it be allowed to deposit the proceeds with the Court pursuant to Rule 67 of the Federal Rules of Civil Procedure.

Counsel for the FDIC had no objection to Plaintiff's Motion at the hearing however counsel for All Souls did object to the deposit of the fund with the Court. All parties were directed to file briefs in support of their positions.

Subsequently, Defendant All Souls filed a Motion to Dismiss on the ground that diversity of citizenship was not present and by reason thereof this Court lacked jurisdiction under the interpleader jurisdictional statute, 28 U.S.C. § 1335.

Plaintiff's brief in opposition states that diversity of citizenship is not required in this action because this Court has original jurisdiction under 12 U.S.C. § 1311 et seq which governs the FDIC, and specifically 12 U.S.C. § 1819 which provides in pertinent part:

> "Upon June 16, 1933, the Corporation shall become a body corporate and as such shall have power—Fourth. To sue and be sued, complain and defend, in any court of law or equity, State or Federal. All suits of a civil nature at common law or in equity to which the Corporation shall be a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction thereof, . . ."

Plaintiff contends that All Souls' attack on diversity jurisdiction is irrelevant because this action is not a statutory interpleader based on 28 U.S.C. § 1335 which expressly requires diversity, but rather is a Rule 22 interpleader which requires either diversity or federal question jurisdiction. Here according to the language of 12 U.S.C. § 1819 this controversy arises under the laws of the United States. As a further basis for jurisdiction herein, Fidelity relies upon 28 U.S.C. § 1349 which provides:

> "The district courts shall not have jurisdiction of any civil action by or against any corporation upon the ground that it was incorporated by or under an Act of Congress, unless the United States is the owner of more than one-half of its capital stock."

While this statute appears to be a negative grant only, it was intended to preserve federal question jurisdiction over congressionally chartered corporate litigations where the United States owns at least a majority interest in the corporation. Since the United States owns more than one-half of the capital stock of the FDIC, *Federal Deposit Insurance Corp. v. George-Howard,* 153 F.2d 591 (8th Cir. 1946) cert. denied 329 U.S. 719, Plaintiff asserts that there is federal jurisdiction of any action by or against the FDIC.

It is the conclusion of this Court that jurisdiction is appropriate over this matter based on both 12 U.S.C. § 1819 (Fourth) and 28 U.S.C. § 1349 and thus Defendant's Motion to Dismiss for lack of jurisdiction is hereby denied.

In response to All Souls' Motion to Dismiss Defendant FDIC as receiver filed a Motion to Intervene in its corporate capacity as insurer of the deposits of Penn Square Bank, N.A. Further, Deposit Insurance National Bank of Oklahoma City, Oklahoma ("DINB") also filed a Motion to Intervene as a defendant in this action. These motions will be resolved in this order after the discussion and disposition of the Plaintiff's Motion for Leave to Deposit Money with the Court which was the genesis of all other activity in this case.

Rule 22 reads in pertinent part as follows:

> "(1) Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. . . . ."

The purpose of interpleader under this rule is to shield a neutral stakeholder from potential multiple liability and litigation from adverse claims, *Underwriters at Lloyd's v. Nichols,* 363 F.2d 357 (8th Cir. 1966). Thus the first stage determination to be made by this Court is whether the

stakeholder, Fidelity Bank may legitimately anticipate double liability with respect to the fund it holds.

In this regard the Court is satisfied that Plaintiff Fidelity Bank is before it in good faith. At the hearing, on Plaintiff's application Defendant FDIC supported Plaintiff's motion to deposit the fund with the Court. However Defendant All Souls objected and urged its position that the Church should not be deprived of the use of its property and that Plaintiff should be required to release the fund together with all accrued interest to Defendant All Souls. In support of its argument Defendant alleges that Fidelity Bank is not in jeopardy of having to litigate multiple lawsuits to determine conflicting claims.

As hereinafter set out the Court finds that by virtue of Fidelity's status as a holder in due course Fidelity is insulated from liability to FDIC and thus FDIC has no claim against Fidelity for the money.

A brief description of the background transactions in this action is helpful.

On July 2, 1982, Penn Square Bank, N.A. duly issued and delivered the following Cashier's checks to the order of All Souls Episcopal Church as payee:

Check No.	*Amount*
195660	$176,307.31
195661	$166,224.99
195690	$109,994.95
TOTAL:	$452,527.25

Immediately prior to the issuance of the Cashier's checks, All Souls had in excess of $650,000.00 on deposit at Penn Square Bank. Later on July 2, 1982 the Cashier's checks were presented to and deposited with Fidelity Bank and Fidelity Bank issued its certificate of deposit for the ac-

count of All Souls in the total amount of the Cashier's checks.

On July 5, 1982 Penn Square Bank became insolvent and the FDIC became the receiver for the bank. Thereafter Fidelity presented the three Cashier's checks in question to the FDIC in its capacity as receiver for Penn Square Bank and FDIC accepted the checks and paid out the face amount of the checks to Fidelity. Subsequently FDIC demanded return of the proceeds from the checks claiming they had been erroneously paid. Further All Souls sought to withdraw the proceeds of the deposit from Fidelity and thus far Fidelity has not permitted withdrawal.

All Souls maintains that the Uniform Commercial Code codified in Oklahoma Title 12A is dispositive of the issue of whether FDIC has a claim against Fidelity Bank.

Addressing final payment of checks, 12A O.S. 1981 § 4-213 provides:

> Final Payment of Item by Payor Bank; When Provisional Debits and Credits Become Final; When Certain Credits Become Available for Withdrawal
>
> (1) An item is finally paid by a payor bank when the bank has done any of the following, whichever happens first:
>
> (a) paid the tiem in cash; or
>
> (b) settled for the item without reserving a right to revoke the settlement and without having such right under statute, clearing house rule or agreement; or
>
> (c) completed the process of posting the item to the indicated account of the drawer, maker or other person to be charged therewith; or
>
> (d) made a provisional settlement for the item and failed to revoke the settlement in the time and

manner permitted by statute, clearing house rule or agreement.

Upon a final payment under subparagraphs (b), (c) or (d) the payor bank shall be accountable for the amount of the item.

(2) If provisional settlement for an item between the presenting the payor banks is made through a clearing house or by debits or credits in an account between them, then to the extent that provisional debits or credits for the item are entered in accounts between the presenting and payor banks or between the presenting and successive prior collecting banks seriatim, they become final upon final payment of the item by the payor bank.

(3) If a collecting bank receives a settlement for an item which is or becomes final (subsection (3) of Section 4—211, subsection (2) of Section 4—213) the bank is accountable to its customer for the amount of the item and any provisional credit given for the item in an account with its customer becomes final.

(4) Subject to any right of the bank to apply the credit to an obligation of the customer, credit given by a bank for an item in an account with its customer becomes available for withdrawal as of right

(a) in any case where the bank has received a provisional settlement for the item, —when such settlement becomes final and the bank has had a reasonable time to learn that the settlement is final;

(b) in any case where the bank is both a depositary bank and a payor bank and the item is finally paid, —at the opening of the bank's second banking day following receipt of the item.

(5) A deposit of money in a bank is final when made but, subject to any right of the bank to apply the deposit to an

obligation of the customer, the deposit becomes available for withdrawal as of right at the opening of the bank's next banking day following receipt of the deposit. Laws 1961, p. 127, § 4—213.

If the payor bank (FDIC here) gives a provisional settlement and does not revoke it before midnight of the day it receives the item, the provisional settlement becomes final. 12A O.S. 1981 § 4-301. There is no dispute that no such revocation was made and that final payment and unconditional settlement therefor was made by FDIC to Fidelity.

Such a payment is final as against a holder in due course of a person who has in good faith changed his position in reliance upon the payment. 12A O.S. 1981 § 3-418. Such payment may not be recovered as against a holder in due course except in cases of fraud or breach of presentment warranties. *Perini Corporation v. First National Bank of Habersham County, Georgia,* 553 F.2d 398, (5th Cir. 1977).

The depository bank (Fidelity here) is a holder in due course to the extent it has given value in return for a check deposited for collection. Title 12A O.S. § 4-209 provides:

> "For purpose of determining its status as a holder in due course, the bank has given value to the extent that it has a security interest in an item provided that the bank otherwise complies with the requirements of Section 3-302 on what constitutes holder in due course."

Under 12A O.S. 1981 § 408(1) a bank has a security interest in an item and accompanying documents or proceeds of either (a) in case of an item deposited in an account to the extent to which credit given for the item has been withdrawn or applied; (b) in case of an item for which it has given credit available for withdrawal as of right to the extent of the credit given whether or not the credit is drawn upon and whether or not there is a right of chargeback; or (c) if it makes an advance against the item.

Because Fidelity Bank gave All Souls credit for the Cashier's checks, Fidelity acquired a security interest in the three checks and the proceeds thereof.

Thus, Fidelity is a holder in due course against whom final payment may not be revoked under 12A O.S. 1981 § 3-418 and FDIC has no claim against Fidelity for the proceeds of the Cashier's checks.

In further support of its position Defendant, All Souls notes two Tenth Circuit cases of relevance here. In affirming a decision of Chief Judge Fred A. Daugherty in *Anderson, Clayton & Co. v. Farmers National Bank of Cordell,* 624 F.2d 105 (10th Cir. 1980) the Circuit Court held that in the limited situation where fraud was present to induce the issuance of a Cashier's check, a stop payment order was justified against the payee. This narrow exception was permitted to the general rule which was stated as follows:

> "The trial court recognized the general rule that the act of issuing a Cashier's check binds the issuing bank to pay the instrument and the bank is not allowed to stop payment on it."

In *Citizens Bank of Booneville v. National Bank of Commerce,* 334 F.2d 257 (10th Cir. 1964) the Court addressed the issue of finality of payment of a Cashier's check issued in payment of what was later revealed to be a forged check drawn on the Oklahoma bank by an Oklahoma-maker-bank in favor of an-Arkansas-payee-bank. Reversing the trial court in favor of the Oklahoma-maker-bank, the court reasoned:

> "... When a holder in due course of a check presents it to the drawee bank and it is accepted, the bank cannot thereafter recover the money from the person to whom it is paid or from any of the indorsers. See: 48 O.S. § 143; 12A O.S. § 3-417; Cherokee National Bank v. Union Trust Co., 33 Okl. 342, 125 P. 464; and Riggs National Bank of Washington, D.C. v. Dade Federal

> Savings & Loan Ass'n., 5 Cir., 268 F.2d 951. The rule has its genesis in Price v. Neal, 3 Burr. 1354, 97 Eng. Rep. 871, decided two centuries ago, and is based upon policy consideration to the effect that the depositary bank should be made the place 'where all prior mistakes or forgeries should be detected, settled, or corrected, once for all; 'and that' payment by such bank to such holder should be treated as final.' "

Under 12A O.S. 1981 § 3-302 Fidelity Bank is a holder in due course and as such payment of the Cashier's checks to it by FDIC should be treated as final.

Since Fidelity is not exposed to a claim by FDIC there is no basis for causing the fund to be deposited with the Court, thereby depriving All Souls, the only remaining claimant to the fund, of its money. All Souls should not be deprived of its property where it cannot be shown that there is a substantive claim upon which Fidelity may ultimately be held liable for distribution of the fund.

Therefore the Plaintiff's action in interpleader is dismissed because Plaintiff is not in jeopardy of having to litigate multiple lawsuits or decide conflicting claims at its own peril. *Fulton v. Kaiser Steel Corporation*, 397 F.2d 580 (5th Cir. 1968). Further Plaintiff's Motion for Leave to Deposit Money with the Court is hereby denied.

In view of the foregoing it is not necessary to reach a determination of the previously mentioned Motions to Intervene by FDIC and DINS as they are both moot.

IT IS SO ORDERED this 22nd day of October, 1982.

/s/ David L. Russell
David L. Russell
United States District Judge

Entered in Judgment Docket on Oct. 22, 1982

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-83-185-W

FEDERAL DEPOSIT INSURANCE CORPORATION and DEPOSIT INSURANCE NATIONAL BANK OF OKLAHOMA CITY, OKLAHOMA, *Plaintiffs,*

v.

PAULINE MCKNIGHT, *Defendant.*

No. CIV-83-186-W

FEDERAL DEPOSIT INSURANCE CORPORATION and DEPOSIT INSURANCE NATIONAL BANK OF OKLAHOMA CITY, OKLAHOMA, *Plaintiffs,*

v.

PAULINE OIL AND GAS COMPANY, *Defendant.*

No. CIV-83-188-W

FEDERAL DEPOSIT INSURANCE CORPORATION and DEPOSIT INSURANCE NATIONAL BANK OF OKLAHOMA CITY, OKLAHOMA, *Plaintiffs,*

v.

ROCKET OIL COMPANY, *Defendant.*

CIV-83-1794-W

FEDERAL DEPOSIT INSURANCE CORPORATION and DEPOSIT INSURANCE NATIONAL BANK OF OKLAHOMA CITY, OKLAHOMA, *Plaintiffs,*

v.

ALL SOULS EPISCOPAL CHURCH, *Defendant.*

[Filed Sep. 4, 1984, Francis C. Bonsiero, Clerk, U.S. District Court, By /s/ Illegible Deputy]

Sidney G. Dunagan, GABLE & GOTWALS, 20th Floor, Fourth National Building, Tulsa, Oklahoma 74119, for the plaintiffs.

Michael Paul Kirschner, John R. Denneny, George W. Dahnke and Merrilyn L. Blackburn, HASTIE AND KIRSCHNER, 3000 First Oklahoma Tower, 210 West Park Avenue, Oklahoma City, Oklahoma 73102, for the defendants Pauline McKnight, Pauline Oil and Gas Company and All Souls Episcopal Church; B. J. Rothbaum, Jr. and Ricki S. Darby, LINN & HELMS, 400 Fidelity Plaza, Oklahoma City, Oklahoma 73102, for the defendant Rocket Oil Company.

MEMORANDUM OPINION AND ORDER

Before the Honorable Lee R. West, United States District Judge

These four cases are virtually identical. The Federal Deposit Insurance Corporation ["FDIC"], in its corporate capacity as insurer of deposits in the nation's banks, and the Deposit Insurance National Bank of Oklahoma City ["DINB"], the new bank through which it paid the insured deposits of Penn Square Bank, N.A., are suing in equity for restitution of money they mistakenly paid the defendants on cashier's checks issued by Penn Square Bank prior to its failure. Although to some degree each arises out of different facts, those facts are very similar, and the law relative to each is the same. Accordingly, they are considered here together. Fed. R. Civ. P. 42(a).

Before the Court now are cross-motions for summary judgment under Federal Rule 56. Fed. R. Civ. P. 56(a), (b). The motions are properly supported by affidavits and other evidence as required by Rule 56(e) and have been thoroughly briefed. For the reasons set forth below, the de-

fendants' respective motions are granted, and those of the FDIC and DINB are denied.

I

A

At the threshold lies the question of the applicable substantive law. As this Court has noted in a number of earlier cases involving the FDIC arising out of the failure of Penn Square Bank, this inquiry is problematical. For example, in *Philadelphia Gear Corp. v. FDIC,* the Court reasoned:

> The applicable substantive law is derived from several sources, depending on the particular claim or defense at issue. Of course, to the extent that a claim or defense arises under the Constitution, laws, or treaties of the United States, federal law governs. *E.g., Deitrick v. Greaney,* 309 U.S. 190, 200-201 (1940); 28 U.S.C. § 1652. And in cases to which the FDIC is a party, federal common law applies if the statute itself does not provide the rule of decision. *D'Oench, Duhme & Co. v. Federal Deposit Insurance Corp.,* 315 U.S. 447, 456-59 (1941) (per Douglas, J.), 465-75 (Jackson, J., concurring). *See generally* P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *Hart and Wechsler's The Federal Courts and the Federal System* 762-70 (2d ed. 1973). However, an important source of federal common law, especially in a commercial context, is the state law under which the disputed legal relationships arose. *See D'Oench, Duhme, supra,* 315 U.S. at 474 (Jackson, J., concurring); *Federal Deposit Insurance Corp.* v. *Bank of America National Trust & Savings Association,* 701 F.2d 831, 834-35 (9th Cir. 1983). *Accord United States v. Kimbell Foods,* 440 U.S. 715, 726-27, 729 (1979) (state law, incorporated as part of federal common law, determines the priority of federal Small Business Administration lien).

Philadelphia Gear, supra, No. CIV-82-1191-W (W.D. Okla Feb. 9, 1984) (Findings of Fact and Conclusions of Law 6-7). Here, there is no federal statute governing the FDIC's restitutionary rights, so well-established federal principles of equity apply. With regard to the defendants' defenses, the Uniform Commercial Code ["UCC" or "Code"] gives content to the federal common law. *See* Section III D, *infra.* Because the Code has been enacted throughout the nation and should be interpreted in a manner that ensures uniformity, Section 1-102(2)(c), 1 U.L.A. 11 (1977), there are not any conflicts of law problems.

B

Federal Rule 56 provides that summary judgment shall be granted if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Summary judgment plays an important role in the Federal Rules; by avoiding the trial of cases in which there is no genuine issue of material fact, it promotes a speedy and inexpensive determination of the merits. Fed. R. Civ. P. 1. *See Washington Post Co. v. Keogh,* 365 F.2d 965, 968 (D.C. Cir. 1966) (per S. Wright, C.J.). However, the standard for granting summary judgment is strict. *Poller v. Columbia Broadcasting System, Inc.,* 368 U.S. 464, 467 (1961) (citing *Sartor v. Arkansas Natural Gas Corp.,* 321 U.S. 620, 627 (1944)). A motion for summary judgment must be denied unless the movant demonstrates its entitlement to it "beyond a reasonable doubt". *Bankers Trust Co. v. Transamerica Title Insurance Co.,* 594 F.2d 231, 235 (10th Cir 1979) (citations omitted). On such a motion, the court must construe the facts in the light most favorable to the nonmoving party and must give that party the benefit of all reasonable inferences to be drawn from the evidence. *Adickes v. S. H. Kress & Co.,* 398 U.S. 144, 153-59 (1970).

II

The facts are not in dispute. On July 2, 1982, certain certificates of deposit ["CD's"] issued by Penn Square Bank to Pauline Oil and Gas matured, and Mrs. McKnight elected to withdraw the proceeds of those CD's. Thus, Penn Square Bank issued its cashier's check no 195662 to Pauline Oil and Gas in the amount of $140,226.41. At that same time, Mrs. McKnight decided to cash another CD issued by the Bank jointly to her and her mother Mrs. Burkhart, even though this latter CD had not matured. In exchange for the proceeds of this CD, the Bank issued Mrs. McKnight its cashier's check no. 195663 in the amount of $183,312.05.

Similarly, Rocket Oil owned Penn Square Bank CD 19169 in the amount of $1.5 million. On July 1, 1982, Rocket redeemed its CD, which at that time was worth $1,480,273.98, and those funds were used to purchase Penn Square Bank cashier's check 195657 in a like amount. Subsequently, Rocket Oil deposited this check in the Oklahoma National Bank of Duncan.

Finally, on July 2, 1982, All Souls Episcopal Church exchanged two CD's issued by Penn Square Bank and commercial paper issued by First Penn Corporation, the Bank's parent holding company, for three Penn Square Bank cashier's checks. Those checks totaled $452,527.25: no. 195660 in the amount of $176,307.31; no. 195661 in the amount of $166,224.99; and no. 195690 in the amount of $109,994.95. Later on July 2, All Souls deposited these three cashier's checks with Fidelity Bank, N.A., of Oklahoma City ["Fidelity"], and in exchange Fidelity issued to All Souls a CD for the total amount of the checks.

Significantly, there is absolutely no evidence that any of these parties knew of Penn Square Bank's impending failure.

At about 7:00 p.m. on Monday, July 5, 1982, the Comptroller of the Currency of the United States declared Penn

Square Bank insolvent under 12 U.S.C. § 191 and appointed the FDIC to act as its receiver under 12 U.S.C. § 1821(c). The FDIC in its corporate capacity then organized DINB as a new bank through which to make available to depositors the insured portions of their deposits. *See* 12 U.S.C. § 1821(f), (h). Thereupon, the FDIC transferred to DINB an amount equal to Penn Square Bank's insured deposits plus DINB's estimated operating expenses. *See id.* § 1821 (j). These amounts were transferred from the FDIC's Permanent Insurance Fund. *See id.* § 1821(a).

Immediately, the FDIC's empoyees prepard to handle checks and other items drawn against the accounts of Penn Square Bank's customers. In doing so, they compiled a list of 4,000 of the Bank's approximately 25,000 accounts and "flagged" each of those accounts in the Bank's computer so that it would reject any transaction in excess of the deposit insurance limit of $100,000. However, through oversight, no such system was installed to monitor cashier's checks drawn by the Bank on itself until Wednesday, July 7, 1982. Affidavit of Steve W. Black, FDIC Liquidation Specialist, Exhibit 1 to Plaintiffs' Motion for Summary Judgment Against Pauline McKnight and Pauline Oil and Gas Co. (Dec. 14, 1983) ["Black Affidavit"].

On Tuesday, July 6, 1982, as part of the normal collection process, Fidelity presented to DINB cashier's checks 195657, 195660, 195661, 195662, 195663, and 195690.[1] DINB paid these items in full by settling accounts with Fidelity through the Federal Reserve Bank.

On July 14, 1982, Fidelity filed an interpleader action to determine who was entitled to the funds it had collected, but on Otcober 22, 1982, its action was dismissed. *Fidelity*

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[1] As to certain of these items, Fidelity was a depositary bank, and as to others it was an intermediary bank under the Uniform Commercial Code. *See* UCC § 4-105, 2A U.L.A., *supra*, at 29. These different capacities, however, are not material here.

Bank, N.A. v. FDIC, No. CIV-82-1042-R (W.D. Okla.). The FDIC and DINB then instituted these actions in 1983.

III

A

In general, a person who is unjustly enriched by a mistaken payment from another owes restitution to him as a matter of equity. *See Restatement of Restitution* §§ 1, 15-27, 46-54 (1937); *Restatement (Second) of Restitution* §§ 1, 5 (Tent. Draft No. 1, 1983); D. Dobbs, *Handbook of the Law of Remedies* §§ 4.1, 4.3, 11.1, 11.8 (1973). This general rule applies with equal force where an agency of the United States, rather than a private party, mistakenly pays money to another. *See, e.g., United States v. Wurts,* 303 U.S. 414, 415 (1938); *Woods v. United States,* 724 F.2d 1444, 1448 (9th Cir. 1984); *Aetna Casualty & Surety Co. v. United States,* 526 F.2d 1127, 1130 (Ct. Cl. 1975). Finally, the rule also applies to banks. *E.g., Bank of Naperville v. Catalano,* 86 Ill.App.3d 1005, 408 N.E.2d 441 (1980). *See* 5A Michie, *Banks and Banking,* ch. 9, § 230 (1983); Annot., 10 A.L.R. 4th 524 (1981).

Here, the plaintiffs have established a *prima facie* case for restitution of money mistakenly paid. When Penn Square Bank was declared insolvent on July 5, 1982, each of the defendants had an unpaid cashier's check or checks drawn by Penn Square Bank on itself. At that time, each defendant was entitled to $100,000.00 in deposit insurance, *see* Federal Deposit Insurance Act § 3, 12 U.S.C. § 1813(*l*)(4), (m)(1); 12 C.F.R. pt. 330 (1984), and a ratable distribution from the assets of the failed Bank on the uninsured balance, *see* 12 U.S.C. § 91, 194. Nevertheless, the FDIC in its corporate capacity, through DINB, mistakenly paid these cashier's checks in full on July 6 because their employees failed to "flag" that account in Penn Square Bank's computer until July 7, so that it would re-

ject any transaction in excess of the deposit insurance ceiling. Black Affidavit, *supra*.

B

However, if an action for restitution is predicated on a negotiable instrument, then special rules apply as defenses. *See Restatement of Restitution, supra,* §§ 29-38; *Restatement (Second) of Restitution, supra,* § 1 comm. n.; D. Dobbs, *supra,* § 4.7 at 287-92. Of particular importance here is the final payment rule. *See* Order 4-7 (June 23, 1983). Section 3-418 of the UCC provides, in pertinent part, that "payment or acceptance of any instrument is final in favor of a holder in due course. . ."[2] Uniform Commercial Code, § 3-418, 2 U.L.A., supra, at 494. The modern rationale underpinning the final payment rule is repose; as the drafters of the Code put it, "it is highly desirable to end the transaction on an instrument when it is paid rather than reopen and upset a series of commercial transactions at a later date" when a problem is detected. *Id.* official comm. 1, 2. Effectively, the rule bars an action for restitution against a holder in due course. J. White & R. Summers, *Handbook of the Law Under the Uniform Commercial Code* § 16-2 at 609-12 (2d ed. 1980); *Restatement (Second) of Restitution, supra,* § 1 comm. n. *Contra Bank Leumi Trust Co. of New York v. Bally's Park Place, Inc.,* 528 F.Supp. 349, 354 (S.D.N.Y. 1981).

Here, the defendants have satisfied the final payment rule, so the plaintiffs' actions are barred. First, the disputed cashier's checks are "instruments" within Section

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[2] The remaining provisions of Sections 3-418 are not relevant here. First, the plaintiffs do not argue that they may recover under Section 4-301 or that the defendants are liable under Section 3-417 for breach of warranty on presentment. Second, the defendants do not contend that they changed their positions in good faith reliance on payment. *See* UCC § 3-418, 2 U.L.A., *supra,* at 494.

3-418 of the Code. *See TPO Inc. v. FDIC,* 487 F.2d 131, 136 (3d Cir. 1973); UCC § 3-118(a), 2 U.L.A., *supra,* at 99. *But see Santos v. First National State Bank of New Jersey,* 186 N.J. Super. 52, 451 A.2d 401, 407-408 (N.J. Super Ct. App. Div. 1982). Second, when DINB settled with Fidelity through the Federal Reserve Bank, the cashier's checks were finally paid. UCC § 3-418, 2 U.L.A., *supra,* at 494; § 4-213(1), 2A U.L.A., *supra,* at 107. *See* J. White & R. Summers, *supra,* §§ 16-2 at 611 & 16-4; 3 R. Anderson, *Uniform Commercial Code* §§ 4-213:1, 4-213:4 (1972 & Supp. 1983); Annot., 23 A.L.R. 4th 203 (1983).

Third, the defendants are holders in due course. Section 3-302 of the Code defines a holder in due course as one who takes an instrument for value, in good faith, and without notice that it is overdue or has been dishonored or of any defense or claim to it on the part of any person. UCC § 3-302(1), 2 U.L.A., *supra,* at 176. Clearly, the defendants paid value for their cashier's checks; specifically, they used the proceeds of their Penn Square Bank CD's or First Penn commercial paper, which they had redeemed. Additionally, there is no evidence that the defendants acted in bad faith[3] or had notice of any defense or claim against the cashier's checks when they purchased them; indeed, at that time, there were no claims or defenses to the instruments. Finally, it is now settled that a payee may be a holder in due course. UCC § 3-302(2) & official comm. 2, 2 U.L.A., *supra,* at 176-77. *See* J. White & R. Summers, *supra,* § 14-7; 2 R. Anderson, *Uniform Commercial Code* § 3-302:19 (1971 & Supp. 1983).

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[3] Significantly, the factual issue of good faith *vel non* was the sole barrier to granting defendants' motions to dismiss in *McKnight, Pauline Oil & Gas,* and *Rocket Oil.* Order, *supra,* at 4-7.

C

Furthermore, in their motions for summary judgment the defendants contend that the plaintiffs' actions are barred by Section 4-213 of the Code, regardless of whether they were holders in due course or changed their positions in good faith reliance on final payment. Section 4-213 provides:

> (1) An item is finally paid by a payor bank when the bank has done any of the following, whichever happens first:
>
> (a) paid the item in cash; or
>
> (b) settled for the item without reserving a right to revoke the settlement and without having such right under statute, clearing house rule or agreement; or
>
> (c) completed the process of posting the item to the indicated account of the drawer, maker or other person to be charged therewith; or
>
> (d) made a provisional settlement for the item and failed to revoke the settlement in the time and manner permitted by statute, clearing house rule or agreement. Upon a final payment under subparagraphs (b), (c) or (d) the payor bank shall be accountable for the amount of the item.
>
> (2) If provisional settlement for an item between the presenting and payor banks is made through a clearing house or by debits or credits in an account between them, then to the extent that provisional debits or credits for the item are entered in accounts between the presenting and payor banks or between the presenting and successive prior collecting banks seriatim, they become final upon final payment of the item by the payor bank.

(3) If a collecting bank receives a settlement for an item which is or becomes final (subsection (3) of Section 4-211, subsection (2) of Section 4-213) the bank is accountable to its customer for the amount of the item and any provisional credit given for the item in an account with its customer becomes final.

(4) Subject to any right of the bank to apply the credit to an obligation of the customer, credit given by a bank for an item in an account with its customer becomes available for withdrawal as of right

(a) in any case where the bank has received a provisional settlement for the item, —when such settlement becomes final and the bank has had a reasonable time to learn that the settlement is final;

(b) in any case where the bank is both a depositary bank and a payor bank and the item is finally paid, —at the opening of the bank's second banking day following receipt of the item.

(5) A deposit of money in a bank is final when made but, subject to any right of the bank to apply the deposit to an obligation of the customer, the deposit becomes available for withdrawal as of the right at the opening of the bank's next day following receipt of the deposit.

UCC § 4-213, 2A U.L.A., *supra*, at 107-108.

Final payment of an item is important for a number of reasons. It is one of several factors determining the relative priorities between items and notices, stop-orders, legal process and set-offs (Section 4-303). It is the "end of the line" in the collection process and the "turn around" point commencing the return flow of proceeds. It is the point at which many provisional settlements become final. See Section 4-213(2). Final

payment of an item by the payor bank fixes preferential rights under Section 4-214(1) and (2).

Id. official comm. 1.

There is a paucity of relevant case law interpreting Section 4-213. On the one hand, two courts have indicated that Section 4-213 protects those who are not holders in due course, although the Courts did not so hold. *Ashford Bank v. Capital Preservation Fund, Inc.*, 544 F.Supp. 26, 28-29 (D. Mont. 1982); *Kirby v. First and Merchants National Bank*, 210 Va. 88, 168 S.E.2d 273, 275 n. 4 (1969). Further, Professors White and Summers have argued in favor of this interpretation in the second edition of their authoritative treatise. J. White & R. Summers, *supra*, § 16-2 at 613-18. On the other hand, however, the better reasoned cases which have addressed the issue squarely have held that Section 4-213 does not bar an action for restitution against one who neither is a holder in due course nor has detrimentally relied on final payment. *National Savings and Trust Co. v. Park Corp.*, 722 F.2d 1303, 1305-1306 (6th Cir. 1983), *cert. denied*, 104 S.Ct. 1916 (1984); *Demos v. Lyons*, 151 N.J. Super. 489, 376 A.2d 1352, 1355-57 (N.J. Super. Ct. Law Div. 1977). These latter cases are far more persuasive, and the Court adopts them here as authoritative.

D

Finally, the FDIC argues in response that once a national bank is declared insolvent and closed, the final payment rule is ineffective *ipso facto* as a defense to an action for restitution of money paid by mistake. This argument may apply in certain instances, but it is not tenable here. For example, if money is mistakenly paid out of the assets of a failed national bank such that the payee is preferred over other uninsured depositors and general creditors, then that payment is "utterly null and void" under the National Bank

Act, 12 U.S.C. § 91, and a defense based on state law or even federal common law cannot negate that which the statute commands. *See* U.S. Const. art. VI. In the cases at bar, however, the mistaken payment was made out of assets transferred from the FDIC's Permanent Insurance Fund to DINB. There are no federal statutes or even judicial decisions which preclude the assertion of the final payment rule in such a circumstance; quite the contrary, the FDIC as an agency of the United States is to be treated as any other party. *Cf., e.g., Clearfield Trust Co. v. United States,* 318 U.S. 363, 369 (1943) ("The United States as drawee of commercial paper stands in no different light than any other drawee.").

When the FDIC organized DINB to make available the insured deposits in Penn Square Bank after the Bank had failed, they assumed a host of attendant duties. In particular, they stepped into the complex and arcane world of bank collections, for when the Bank failed, there were surely myriad items being processed. As the authors of the Code noted:

> It must be remembered that in bank collections as a whole and in the handling of items by an individual bank, items go through a whole series of processes. It must also be remembered that at any particular point of time a particular bank (at least one of any size) is functioning as a depositary bank for some items, as an intermediary bank for others, as a presenting bank for still others and as a payor bank for still others, and that when it suspends payments it will have close to its normal load of items working through its various processes.

UCC § 4-214 official comm. 1, 2A U.L.A., *supra,* at 119-20.

Therefore, the salient issue is at what point in those processes has an item progressed far enough that it should be completed, instead of being sent back and reversing all

the steps in those processes. That point is final payment as defined in Section 4-213(1). *See id.*[4] At that point, the bank becomes accountable for the item under Section 4-213 (1), and an action for restitution is barred by Section 3-418. Here the cashier's checks in dispute were finally paid, and the FDIC may not obtain restitution of the money it paid in excess of the deposit insurance limit. The rationale of repose requires that it bear the loss.[5]

IV

Accordingly, the plaintiffs' motions for summary judgment are denied, and the defendants' motions for summary judgment are granted.

IT IS SO ORDERED this 4th day of September, 1984.

/s/ LEE R. WEST
Lee R. West
United States District Judge

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[4] Section 4-214 of the Code does not itself apply to national banks, *id.* official comm. 3, because federal law forbids preferential treatment in distributing the assets of an insolvent national bank, 12 U.S.C. § 91. Nonetheless, the drafters' comments to Section 4-214 are an invaluable guide in determining the policies which should inform the Court's decision. *See, e.g.,* National Savings & Trust Co. v. Park Corp., *supra,* 722 F.2d at 1306.

[5] Actually, that loss is not total. It appears that the FDIC in its corporate capacity is thereby subrogated to the payees' rights in the assets of the failed bank, 12 U.S.C. § 1821(g), giving it the right to share ratably in the estate, 12 U.S.C. § 194.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-83-185-W

FEDERAL DEPOSIT INSURANCE CORPORATION and DEPOSIT INSURANCE NATIONAL BANK OF OKLAHOMA CITY, OKLAHOMA, *Plaintiffs,*

v.

PAULINE MCKNIGHT, *Defendant.*

No. CIV-83-186-W

FEDERAL DEPOSIT INSURANCE CORPORATION and DEPOSIT INSURANCE NATIONAL BANK OF OKLAHOMA CITY, OKLAHOMA, *Plaintiffs,*

v.

PAULINE OIL AND GAS COMPANY, *Defendant.*

No. CIV-83-188-W

FEDERAL DEPOSIT INSURANCE CORPORATION and DEPOSIT INSURANCE NATIONAL BANK OF OKLAHOMA CITY, OKLAHOMA, *Plaintiffs,*

v.

ROCKET OIL COMPANY, *Defendant.*

CIV-83-1794-W

FEDERAL DEPOSIT INSURANCE CORPORATION and DEPOSIT INSURANCE NATIONAL BANK OF OKLAHOMA CITY, OKLAHOMA, *Plaintiffs,*

v.

ALL SOULS EPISCOPAL CHURCH, *Defendant.*

[Filed September 4, 1984. Francis C. Bonsiero, Clerk, U.S. District Court]

JUDGMENT

In accordance with this Court's Memorandum Opinion and Order filed this day, judgment is hereby entered in favor of the defendants and each of them and against the plantiffs. The defendants need not make restitution of the money they received from the plaintiffs in excess of the deposit insurance limit of $100,000.00.

The Clerk of the Court is instructed to mail a copy hereof to counsel of record.

Dated this 4th day of September, 1984.

/s/ Lee R. West
Lee R. West
United States District Judge

Entered in Judgment Docket on 9-4-84.

Supreme Court, U.S.
FILED
DEC 23 1986
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 85-708

In the Supreme Court of the United States

OCTOBER TERM, 1985

ALL SOULS EPISCOPAL CHURCH, PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION AND DEPOSIT INSURANCE NATIONAL BANK OF OKLAHOMA CITY, OKLAHOMA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-708

ALL SOULS EPISCOPAL CHURCH, PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION AND DEPOSIT INSURANCE NATIONAL BANK OF OKLAHOMA CITY, OKLAHOMA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner, a depositor of an insolvent bank, contends that it is entitled to retain funds mistakenly paid in excess of the insured deposit limit.

1. On Friday, July 2, 1982, Penn Square Bank, N.A. (Penn Square) issued three cashier's checks totaling $452,527.25 to petitioner All Souls Episcopal Church (All Souls). On Monday, July 5, 1982, Penn Square was declared insolvent, the FDIC was appointed receiver and, in turn, created the Deposit Insurance National Bank of Oklahoma City, Oklahoma (DINB) as its agent to distribute the insured portion of deposits in the failed bank.[1] Upon

[1]Under 12 U.S.C. 1821(h), the FDIC has the authority to create a new bank to facilitate the payment of insured deposits. See 12 U.S.C. 1821(i), (j), (k), and (*l*).

declaration of Penn Square's insolvency, All Souls' cashier's checks became deposits in the insolvent bank. 12 U.S.C. 1813(*l*)(4). Thus, as a depositor, All Souls was entitled to $100,000 in federal deposit insurance. 12 U.S.C. 1813(m)(1).

On July 6, 1982, the cashier's checks were presented to DINB for payment. DINB mistakenly paid out the face amount of the checks, $452,527.25, rather than the $100,000 to which All Souls was entitled. Shortly thereafter, respondents commenced this action for restitution of the $352,527.25 overpayment to petitioner.

2. The district court granted summary judgment in favor of petitioner. It held that while respondents had established a prima facie case for restitution of money mistakenly paid, recovery was barred because the overpayments were "final" within the provisions of the Uniform Commercial Code (12A Okla. Stat. Ann. § 3-418) (West 1963).

The court of appeals reversed. It ruled that petitioner's claim against the FDIC was based on a deposit obligation created by federal law, not on the U.C.C. (Pet. App. 5a). Since payment in excess of insured amounts was contrary to federal statutes governing the liquidation of failed national banks (*id.* at 6a), such payments were barred, and respondents were entitled to restitution of the balance.

3. The decision of the court of appeals is correct. It does not conflict with any decisions of this Court or of any other court of appeals. Further review is therefore not warranted.

a. Upon the insolvency of Penn Square, the cashier's checks became deposits, the payee became a depositor, and the rights and liabilities of the parties were fixed by federal statutes applicable to federal deposit insurance and the liquidation of the assets of a failed bank. 12 U.S.C. 1813(*l*)(4), 1813(m)(1); *American National Bank* v. *FDIC*, 710 F.2d 1528, 1540 (11th Cir. 1983). It is well established that

the rights and obligations of the FDIC are governed by federal law. *D'Oench, Duhme & Co.* v. *FDIC,* 315 U.S. 447 (1942); *United States* v. *Yazell,* 382 U.S. 341, 354 (1966). Under the Federal Deposit Insurance Act, when the FDIC liquidates an insured institution such as Penn Square, a depositor generally is authorized to receive up to $100,000 from the deposit insurance fund. For this reason the DINB was empowered to pay only the *insured* deposits of the failed bank (see 12 U.S.C. 1813(m), 1821(h)); any payments in excess of that amount were unauthorized. See *Federal Crop Insurance Corp.* v. *Merrill,* 332 U.S. 380, 384 (1947). Accordingly, petitioner has no rightful claim "to retain money that it should never have received in the first place." *Heckler* v. *Community Health Services,* No. 83-56 (May 21, 1984), slip op. 9; *United States* v. *Wurts,* 303 U.S. 414, 415 (1938); see *Wisconsin Central R.R.* v. *United States,* 164 U.S. 190, 207-212 (1896); *United States* v. *Burchard,* 125 U.S. 176 (1888); *Woods* v. *United States,* 724 F.2d 1444, 1448 (9th Cir. 1984).

b. The issues of state law petitioner posits do not present any occasion for this Court's review. In any event, petitioner's arguments cannot displace the governing principle of federal law that, in these circumstances, payment of more than $100,000 was unauthorized. Finally, petitioner's state law contentions are incorrect. The special rules of the Uniform Commercial Code relating to negotiable instruments, holders in due course and transactions in the ordinary course of business with a solvent bank, do not supersede laws governing the distribution of Federal Deposit Insurance proceeds and the liquidation of the assets of a failed bank. *Harmsen* v. *Smith,* 693 F.2d 932 (9th Cir. 1982), cert. denied, 464 U.S. 822 (1983); *Miller* v. *Wells Fargo Bank International Corp.,* 406 F. Supp. 452, 470 (S.D.N.Y. 1975); *Lewis* v. *Franklin Savings Bank of New York,* 98 Misc. 2d 1098, 1100, 415 N.Y.S.2d 362, 364 (Civ. Ct. 1979); 12 U.S.C. 1822(c), 1822(d).

Moreover, under Oklahoma law money paid through mistake is recoverable in restitution. *Avery* v. *Abraham,* 114 Okla. 101, 243 P. 728 (1926); Restatement of Restitution §§ 1, 15-27, 46-54 (1937); Restatement (Second) of Restitution §§ 1, 5 (Tent. Draft No. 1, 1983); D. Dobbs, *Handbook of the Law of Remedies* §§ 4.1, 4.3, 11 (1973). Similarly, the Uniform Commercial Code preserves the right of restitution for monies paid by mistake. 12A Okla. Stat. Ann. § 1-103 (West 1963); *Central National Bank & Trust Co.* v. *Community Bank and Trust Co. of Enid,* 528 P.2d 710 (Okla. 1974). Accordingly, even if petitioner were correct in urging that the U.C.C. settlement procedures applied in these circumstances, the result would be no different.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

DECEMBER 1985

DOJ-1985-12